2585

No. 12263

In the United States
COURT OF APPEALS
for the Ninth Circuit

ALEXANDER S. PAGE, JR.,

Libelant and Appellant,

vs.

UNITED STATES OF AMERICA, as represented by the United States Maritime Commission, successors to the War Shipping Administration, and MOORE-McCORMACK LINES, INC., a corporation,

Respondents and Appellees.

BRIEF OF APPELLEES

Upon Appeal from the United States District Court for the District of Oregon.

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PAUL P. O'BRIEN,

HENRY L. HESS,
United States Attorney,
FLOYD HAMILTON,
Assistant United States Attorney,
Proctors for Appellee, United States of America;

WOOD, MATTHIESSEN & WOOD,
ERSKINE WOOD,
1310 Yeon Building, Portland, Oregon,
Of Counsel for United States of America, and Proctors for Appellee, Moore-McCormack Lines, Inc.

STEVENS-NESS LAW PUB. CO., PORTLAND 7-48

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CASES CITED

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STATEMENT OF THE CASE

The facts are set forth in the trial court's Findings of Fact (Ap. 19-23) and appellees adopt them as a clear statement of the case.

ARGUMENT

The trial court's Findings are fully supported by the testimony of the witnesses, all given in open court, and

the facts therein stated are in themselves a sufficient argument to affirm the decree. Libelant, pursuant to a routine order to do a minor routine job, stepped on a valve cover, not intended for that purpose, and slipped off it. He need not have stood on the valve cover at all. He could have reached the work from the floor-plates or from the first grating above the floor plates, or if he did not choose these methods, he had two ladders available to him. The case is governed by *Vileski v. Pacific-Atlantic S. S. Co.,* 163 F. (2d) 553, in this Circuit. Cf. *The Swift Arrow,* 1930 A.M.C. 1740; *Bassett v. City of New York,* 13 Fed. Supp. 1022; *The Quinnipiac,* 1926 A.M.C. 1150; *The Hollywood,* 1925 A.M.C. 1165. The order to libelant to grind in the slide valve was a general order. No details were specified. Everything was left to libelant, which was quite proper, for, as he said himself, he knew how to do it (Ap. 47-8).

The claim that heavy seas were running, causing the ship to roll unduly, is utterly disproved. The log book entry is: "Light E'ly Breeze and Sea" (Log, April 17th). The wind was only Force 2 (Log, April 17th). The condition of the sea was "1" (Log, April 17th).

The claim that libelant's physical condition was such that he should not have been ordered to do this work "while heavy seas were running" (not true) is likewise without merit. He hired himself out to do it. He had been making many voyages without any trouble; in fact he had just returned from one. He told the chief engineer that he could do the work. And he could. In fact he did similar jobs both before and after the one

on April 17th. The Engineroom Log shows that on his day watch, April 13th, he "Repaired Governor on outboard service pump"; on his night watch, April 20th, he "Overhauled drain valves on outboard feed pump"; on his night watch, April 21st, he "Overhauled drain valve and ground in slide valve on starboard fuel oil service pump". Dr. Kimberley says that even after this accident Page was "surprisingly well" and was fit to go to sea and resume his calling as a seaman (Ap. 169).

The order, therefore was merely a simple one to do a small routine job, within the scope of Page's duties and knowledge, and no authorities are needed to show that this is not negligence.

When Page stepped on the valve cover, a place never intended to be used as a step, he took whatever risk was attendant thereon. First, because if it was oily or greasy, as he said, this, according to his statement (Ap. 62), is a normal condition on most ships, though he modified this statement later. Second, he took the risk because, if they were oily or greasy, it was up to him to wipe them off. Third, and most important, he took the risk because the valve cover was never intended as a step in the first place. Page should not have used it. He should have stood on the floor-plates or on the grating above, as demonstrated in the photographs in evidence; or, if he did not want to do that, he should have got one of the two ladders which were available. *Vileski v. Pacific-Atlantic S. S. Co., supra,* controls.

Appellant's brief finds fault with the trial court's Findings of Fact because they do not state that libelant

struck his groin on a "rocker arm" when he slipped. The court found that "He did twist his body and in so doing strained and wrenched himself in the area of the old fracture". The "rocker arm" is just an incident to this general statement of this straining and wrenching. Of course whether he struck a "rocker arm" or not, is entirely immaterial on the question of liability; and is also immaterial on the extent of his injuries. These were specifically described, and the period of disability stated, by Dr. Kimberley, libelant's own witness, and this testimony, the most favorable to libelant, was accepted by the court.

The court denied damages, but allowed libelant $274.88, wages to the end of the voyage, and bonus, and $296 as maintenance (Ap. 29). Appellant's brief claims, Page 20, that he should have had "double wages". It is well known that the double-wages penalty statute never applies to unearned wages; as these were. *Halvorsen v. U. S.*, 284 F. 287; *The Vermar,* 1938 A.M.C. 890.

Appellant's brief claims, Page 22, that he should have had $984 maintenance calculated for 164 days at $6.00 a day, and objects to the trial court's allowance of $296 as maintenance. The trial court's allowance was based on 74 days at $4.00 a day.

Libelant did not furnish proof of his living cost, which is the basis of maintenance, and, strictly, respondents could have insisted on it. But they did not. The current rate for maintenance at the time of the injury, as established by the U. S. Maritime Commission, was $3.50 a day for unlicensed men, and from $4 to $6 a

day for licensed men up to and through the grades of chief engineer and captain. Libelant was an unlicensed man although serving under a "waiver" as engineer. In these circumstances the court adopted the $4-a-day rate established by the U. S. Maritime Commission and allowed 74 days at $4 a day,—$296.00.

It has always seemed to us doubtful whether libelant was entitled to any maintenance at all; for his injury did not *disable* him from work; he kept right on with his daily work on the ship until he left her in Kobe, and *then* it was not because of his injury on this ship that he left her, but because of his old injury on the SAMOA.

This is plainly apparent from the Certificates of the Army doctors at Osaka, who recommended that he be relieved and sent home (Libelant's Exhibits 17 and 35; and Respondents' Exhibit 18). Libelant's Exhibit 17 is merely a copy of 35, the original. They diagnose the case as:

> "Un-united fracture neck of femur, right, A.i. 17 Apr. 1943 off coast of Oregon struck by Japanese Torpedo when on S.S. KATHLEEN L. BATES." (Name of ship an error for the SAMOA. Libelant was not on the BATES in 1943 and she was not torpedoed.)

Because of this old "un-united fracture", and not from any strain on the BATES, they recommended that libelant be relieved from duty, as too strenuous, and returned home as a passenger. Respondents' Exhibit 18 is to the same effect,—"an old non-united fracture"; recommends relief from "present duties", and return to the United States as a passenger.

It is perfectly plain that this old non-united fracture from the torpedoing was the basis of their recommendations and not the trifling aggravation, if there was any, on the BATES at all. They do not even mention it. They simply found Page in the same condition that he was in when he joined the ship in Portland. It is for these reasons that we say the claim for maintenance is doubtful to say the least.

But if maintenance is to be allowed, here is the record:

Libelant was repatriated on the BLUE JACKET, arriving in San Francisco on May 23rd, and at his home in Portland on May 24th or 25th (Ap. 27). He does not claim maintenance from this date. He dates his claim from June 15th, as appears from Article II of his libel, where he alleges that he was "disabled after the return of said vessel (the KATHLEEN L. BATES) to the United States on June 15, 1946, to on or about December 20, 1946, except for approximately 6 weeks", etc. (Ap. 5-6). (The BATES returned earlier than this, as appears from some of the exhibits; but of course her return has no bearing on maintenance.)

Dr. Gurney Kimberley, the specialist who attended libelant on behalf of the Public Health Service, and who was libelant's principal and only medical witness, examined him at his own request (Ap. 45) on August 28, 1946, and reported that libelant had got along "surprisingly well", and was, on that date, "able to return to work as a seaman" (Libelant's Exhibit 5). Of course we cannot know how much *earlier* than that date he

would have been reported "able to return to work" if Dr. Kimberley had seen him earlier.

On this state of the record the Court allowed from June 15th to August 28th,—74 days. In doing so he accepted *libelant's own libel* as to when the period started, and *libelant's own witness* as to when it ended. We do not see how libelant could expect more. In fact, considering that the whole claim is doubtful for the reasons stated, we think he was generously treated.

That the decree was correct in dismissing the libel as to the General Agent, Moore-McCormack Lines, Inc., is now definitely established by the recent decisions of the United States Supreme Court in *McAllister v. Cosmopolitan Shipping Co., Inc., Gaynor v. Agwilines,* and *Fink v. Shepard Steamship Co.,* 93 L. Ed., p. .....

The trial court's decree should be affirmed.

Respectfully submitted,

HENRY L. HESS,
United States Attorney,

FLOYD HAMILTON,
Assistant United States Attorney,

Proctors for Appellee, United State of America;

WOOD, MATTHIESSEN & WOOD,
ERSKINE WOOD,
1310 Yeon Building,
Portland, Oregon,

Of Counsel for United States of America, and
Proctors for Appellee, Moore-McCormack Lines, Inc.